A Primer to British Columbia's New Health Care Consent Legislation:

The Health Care (Consent) and Care Facility (Admission) Act

March 2000

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BRITISH COLUMBIA

Ministry of Health and
Ministry Responsible for Seniors

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Obtaining Copies of the Health Care (Consent) and Care Facility (Admission) Act, and the Health Care Consent Regulation:

Copies of the Act and the Regulation may be purchased from Crown Publications Inc.,
521 Fort Street, Victoria, BC, V8W 1E7
phone: (250) 386-4636, Fax: (250) 386-0221
or visit the government publications website at http://www.publications.gov.bc.ca

Copies of an unofficial consolidated version of the Health Care (Consent) and Care Facility (Admission) Act and the Representation Agreement Act, are available on the Public Guardian and Trustee of British Columbia's website: www.trustee.bc.ca
Fax: (604) 775-0777.

Obtaining copies of resource materials related to the new health care consent legislation:

- A Primer to British Columbia's New Health Care Consent Legislation
- A Health Care Provider's Guide to Consent for Health Care, and its attached: Practice Guidelines for Determining Incapability to Consent to Health Care
- Consent to Health Care brochure
- Health Care and Care Facility Review Board: Providing Safeguards brochure

The above materials are available on the Ministry's website:
www.hlth.gov.bc.ca/cpa/publications/index.html
or may be obtained from:

Manager, Adult Guardianship,
Tel: (250) 952-1083
Fax: (250) 952-2205,
e-mail: pieter.degroot@moh.hnet.bc.ca

or contact:

The BC Ministry of Health and Ministry Responsible for Seniors' free information line, at 1-800-465-4911, or visit the ministry's home page at: http:\\www.hlth.gov.bc.ca

Disclaimer:

This Primer should not be regarded as a substitute for the Health Care (Consent) and Care Facility (Admission) Act or a lawyer's advice.

Canadian Cataloguing in Publication data

Main entry under title:
A primer to British Columbia's new health care consent legislation

ISBN 0-7726-4146-3

1. British Columbia. Health Care (Consent) and Care Facility (Admission) Act.
2. Informed consent (Medical law) - British Columbia.
3. Capacity and disability - British Columbia.
4. Power of attorney - British Columbia.
I. British Columbia. Ministry of Health and Ministry Responsible for Seniors.

KEB299.3.P74 2000 344.711'0412 C00-960057-4
KF1347.P74 2000

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I. THE NEW HEALTH CARE CONSENT LEGISLATION: AN INTRODUCTION

On February 28, 2000, significant portions of four new statutes, which comprise the new provincial adult guardianship and substitute decision-making legislation, will come into effect. Together, these Acts promote self-determination and autonomy and form the basis for a comprehensive and integrated system of support and assistance for adults who need help making decisions about their health and personal care, and/or their financial or legal affairs, or who need others to make decisions for them.

Of the four statutes, the *Health Care (Consent) and Care Facility (Admission) Act* is particularly relevant to health care professionals. The Act sets out the procedure to follow when seeking consent to health care from an adult, or if the adult is incapable, from a substitute decision maker. The other Acts are the *Representation Agreement Act*, the *Adult Guardianship Act*, and the *Public Guardian and Trustee Act*.

Only the health care consent and the review board provisions of the *Health Care (Consent) and Care Facility (Admission) Act* will come into force in February. The need to implement the care facility admission provisions will be considered at a later date.

Note: Except for headings, this Primer will hereafter refer to the Health Care (Consent) and Care Facility (Admission) Act as "the Act".

Application of the Health Care (Consent) and Care Facility (Admission) Act

The Act :

- applies only to adults. The *Infants Act* continues to govern consent to health care for those under age 19.
- does not apply to psychiatric treatment and care for those who are involuntarily admitted for the treatment of a mental disorder under the *Mental Health Act*.
- does not affect human tissue gifts, involuntary treatment for communicable diseases (including tuberculosis and sexually transmittable diseases), and other health care interventions mentioned in the *Health Act*.
- does not apply to emergency medical assistants (notably, ambulance crews).
- does not apply to non-therapeutic sterilization for person incapable of giving consent; substitute consent for such procedures is prohibited by a decision of the Supreme Court of Canada.

What is "Health Care"? [s. 1]

The Act defines health care as: *"...anything that is done for a therapeutic, preventive, palliative, cosmetic or other purpose related to health, and includes (a) a course of health care, for example, a series of immunizations or dialysis treatments or a course of chemo therapy, and (b) participation in a medical research program approved by an ethics committee designated by regulation.*

Who Must Comply With the Act? [s.1]

The Act applies to all persons, who under a prescribed Act are licensed, certified or registered to provide health care. A listing of health care professionals covered by the Act is contained in Appendix 1.

II. ELEMENTS OF HEALTH CARE CONSENT

The Act contains two key elements:

Presumption of Capability [s. 3]

Every adult is presumed to be capable of giving, refusing or revoking consent to health care until the contrary is demonstrated. An adult's way of communicating is not, by itself, grounds for deciding that he or she is incapable of giving, refusing or revoking consent.

Consent Rights [s.4]

Every adult who is capable of giving or refusing consent to health care has the right:

- to give or refuse consent on any grounds[1], including moral or religious grounds, even if refusal will result in death;
- to select a particular form of available health care on any grounds, including moral or religious grounds;
- to revoke (i.e., withdraw or rescind) consent;
- to expect that a decision to give, refuse or revoke consent will be respected;
- to be involved to the greatest degree possible in all care planning and decision making.

Although these rights are not new, this is the first time that these rights have been set out in legislation in British Columbia. Other elements of the new health care consent legislation include the following:

Consent - The General Rule [s. 5]

A health care provider must not provide health care to an adult without the adult's consent, unless circumstances prescribed in sections 11 to 15 of the Act apply (e.g., in an emergency). Health care providers must make every reasonable effort to obtain the adult's consent before deciding to seek substitute consent.

Another legal effect of the wording of section 5 is that a health care provider cannot act directly on an adult's advance directive, unless it is an urgent or emergency situation. If it is not an urgent or emergency situation, the health care provider must obtain a consent decision from a substitute decision maker who must, however, make the decision in accordance with the adult's wishes or instructions expressed while capable, if these are known.

Appendix 2. contains three flow charts showing the process for obtaining consent in urgent or emergency situations and for minor and major health care situations when substitute consent is obtained from either: (1) a prior authorized substitute decision maker (committee of the person or representative); or (2) a "temporary substitute decision maker" (a spouse or other relative or someone authorized by the Public Guardian and Trustee)

Appendix 3. discusses the role of advance directives in the health care consent process when it is an urgent or emergency health care situation and when it is not.

Who is Responsible for Obtaining Consent ? [s. 5]

The person who is providing or proposing to provide an adult with health care is responsible for obtaining consent, and may be liable if treatment proceeds without consent. If the health care is to be provided by a team of, for example, nurses, one of the members may obtain consent

[1] Except in situations where the Act does not apply (see p 1).

on behalf of the team. If the health care involves surgery, the surgeon obtains consent on behalf of the entire O.R. team. It is important to document accurately and completely all decisions made and actions performed under the Act, when obtaining consent.

Requirements for Valid Consent [s.6]

A consent will be valid (meaning that it complies with the Act) if the consent:

- relates to the health care that is proposed;
- is given voluntarily;
- is not obtained by fraud or misrepresentation;
- the adult is capable of giving or refusing consent;
- the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and make a decision about it, including information about:
  - the condition for which the health care is proposed;
  - the nature of the proposed health care;
  - the risks and benefits of the health care that a reasonable person would expect to be told about, and any alternative courses of health care, including the option of having no health care at all; and
- the adult has the opportunity to ask questions and receive answers about the proposed health care.

Duty to Communicate with the Adult in an Appropriate Manner [s. 8]

When seeking consent, a health care provider has a duty to communicate with the patient in a way that is appropriate to the patient's skills and abilities. When communication barriers exist, someone close to the patient, such as an accompanying family member or friend can often help.

Making a Decision About A Patient's Incapability

A patient is presumed to be capable of making a health care decision unless and until the patient's responses to the information being provided clearly indicate that the person is incapable of making the specific decision.

If a health care provider thinks that a patient is incapable, the health care provider should consider whether any communication barriers exist which affect the patient's ability to articulate a decision. Where possible, the health care provider will consult with family, friends, the patient's regular physician, or anyone else who may be able to assist in the communication process.

The Legal Test of (Mental) Incapability [s.7]

When deciding whether a patient is incapable of making a particular consent decision, a health care provider must base the decision on whether or not the patient demonstrates an understanding:

- of the information given to him or her; and,
- that the information applies to the patient's own [health] situation.

The patient's understanding of the information they have been given about the nature, consequences and alternatives to health care may be tested by asking the patient to repeat the information in his or her own words or manner. On the basis of this simple test, a health care provider might decide that the adult is not capable of making a health care decision. The observations that form the basis for the decision should be documented.

A Guide: "Practice Guidelines for Determining Incapability to Consent to Health Care," is attached to the detailed guide: "A Health Care Provider's Guide to Consent to Health Care" (see inside cover page).

Different Ways of Communicating Consent [s. 9]

A person can express consent in different ways: orally; in writing; or by conduct that implies consent. For example, a patient might signify consent by a nod of the head, or by offering an arm for an injection, when requested. Family members or friends can help the health care provider by confirming whether the adult is communicating consent or refusal to consent. An interpreter may also be used, or alternate and augmentative communication systems; such as sign language, explanations in large print, or illustrations of the health care procedure.

The Scope of Consent, Including Consent to a Course of Treatment [s. 9]

A consent to health care is not a consent for all purposes. It only applies to the specific health care that the patient needs. Similarly, if the adult specifies that the health care must be provided by a particular health care provider, no one else may give the health care without first getting the adult's consent unless:

- the health care is already in progress when the adult's wishes become known, or
- delay is likely to put the adult's life or health at risk.

A health care provider may ask an adult to consent to an overall plan or course of health care, including repeats of certain procedures. If so, the health care provider must get consent for the plan of health care at the outset (e.g., at the start of a course of chemotherapy). The health care can then continue until there is a change in the health care plan or until the adult refuses the health care. When there is a *significant* change to the health care plan or a new procedure is introduced, consent for the new treatment must be obtained.

Consent to Unexpected Treatment [s. 9]

Not everything in health care is predictable. A health care provider may explain a procedure fully to a patient and get a valid consent. Then, part way through the procedure the health care provider may find that something further or different needs to be done. It is not always practical to start over to get another consent. The Act provides rules for such situations:

A health care provider may provide additional or alternative health care to an adult if:

- the health care that was consented to is in progress;
- the adult is unconscious or semi-conscious; and
- the additional or alternative health care is medically necessary to deal with conditions that were unforeseen when consent was given.

If a patient demands that a treatment stop in the middle of a procedure, but agrees to its continuation after a brief rest, the health care provider does not have to go through the process of obtaining a new consent, provided the health care provider is satisfied that the patient understands what the continuation of the treatment involves.

Same Rules Apply When Obtaining Substitute Consent. [s. 10]

The general consent rules set out above also apply when a patient is incapable of making a decision and the health care provider seeks consent from a substitute decision-maker.

III. TREATMENT WITHOUT A PATIENT'S CONSENT [ss.11, 12, 13, 14 and 15]

The general rule is that a patient's consent is required for all types of health care. However, there are four exceptions[2]:

1. when a health care provider has decided that a patient is incapable and substitute consent is given by a representative[3] or a committee of person appointed by the court under the *Patients Property Act*[4], [s.11]
2. when there is an urgent or emergency health care situation; [s.12]
3. preliminary examination, treatment or diagnosis; [s.13]; and
4. when a patient is thought to be incapable and a spouse or relative of the patient gives substitute consent. [ss.14, 15 and 16]

Using a Representative, or a "Committee" Appointed by the Court [s. 11]

A health care provider must make every reasonable effort to get a patient's consent before asking someone else to make a substitute decision. However, health care may be given without the patient's consent if:

- the health care provider has determined that the adult needs the health care and is incapable of giving or refusing consent; **and**
- the adult's representative or committee of person has authority to consent, is capable of consenting, and gives consent.

To find out if the patient has a representative or a committee with the authority to make the specific consent decision, a health care provider should contact the patient's family or friends. In addition, the Public Guardian and Trustee will know whether the person has a committee appointed by the court.

Health Care in Urgent and Emergency Situations [s. 12]

Even in urgent or emergency situations, consent for health care should be obtained from the patient if possible. However, a health care provider may provide health care without a patient's consent if:

- the health care must be provided without delay to save the patient's life, to prevent serious physical or mental harm, or to alleviate severe pain;
- the patient is apparently impaired by drugs or alcohol, is unconscious or semi-conscious or is, for any other reason, in the health care provider's opinion, incapable of giving or refusing consent;
- the patient does not have a representative or committee who is authorized to consent to the proposed health care, is capable of doing so, is available, and is willing to make the health care decision; **and**
- where practicable, a second health care provider confirms the first's opinion about the need for health care and the patient's incapability to make the decision.

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[2] In addition to those situations where the Act does not apply (see p 1.)

[3] A representative is someone appointed by the adult through a representation agreement, which is a proxy type of advance health care directive.

[4] In the future, if part 2 of the *Adult Guardianship Act* is proclaimed, a court-appointed substitute decision-maker or guardian could be others authorized to make substitute consent decisions for health care.

If the patient has an advance directive (AD) containing instructions/wishes that clearly apply to the presenting health need and the range of treatment choices, these instructions/wishes should be followed. Where the health care provider has reason to believe that the treatment of choice might not have been known to the patient when the instructions or wishes were made, then the instructions or wishes should not be followed.

Preliminary Examination [s. 13]

A health care provider may undertake triage or another kind of preliminary examination, treatment or diagnosis without following the procedure for obtaining valid consent if:

(a) the adult indicates that he or she wants to be provided with the health care, or

(b) in the absence of any indication by the adult, the adult's spouse, relative or friend indicates that he or she wants the adult to be provided with health care.

If a Patient is Incapable and There is No Representative or Committee of Person [s. 14 and 15]

Certain procedures need to be followed when deciding how to provide health care without the patient's consent in non-urgent and non-emergency situations when, (a) the patient is incapable of giving consent, (b) the patient does not have a representative or court-appointed committee of person, and (c) the health care provider chooses a "temporary substitute decision maker" (TSDM) such as a spouse or other relative, or if none available and qualified, a person authorized by the Public Guardian and Trustee, as per section 16 of the Act. The process for obtaining consent from a TSDM differs in some respects depending upon whether major or minor health care is involved.

If the treatment is major health care, the health care provider must:

- consult with the adult's spouse, relative or friend during the process of determining that the adult needs the major health care and is incapable of giving or referring consent to it, and
- wait 72 hours after obtaining substitute consent from a TSDM, and
- notify the adult in writing, using Form 1 about the decision regarding incapability, the choice of TSDM and the right.

Defining Major and Minor Health Care

The Act distinguishes between major and minor health care.

Major health care is defined in the Act and the Health Care Consent Regulation. It includes major surgery, any treatment requiring a general anaesthetic, major diagnostic or investigative procedures, radiation therapy, intravenous chemo-therapy, kidney dialysis, electro convulsive therapy and laser surgery.

Minor health care is any treatment or procedure that **is not** major health care. For example, immunizations, blood tests, routine dental fillings and extractions, and routine clinical procedures such as suturing of a cut or wound..

Providing Major or Minor Health Care With Substitute Consent from a Temporary Substitute Decision Maker [s. 14, 15 and 16]

A health care provider may provide major or minor health care to an adult without the adult's consent, but with substitute consent from a TSDM, **if:**

- the health care provider is of the opinion that the adult needs the health care and is incapable of giving or refusing consent; and
- the adult does not have a representative or court-appointed "committee" who is authorized to make health care decisions, is capable of doing so and is available; **and**
- the TSDM (patient's spouse or other relative chosen by the health care provider, or a person authorized by the Public Guardian and Trustee) gives substitute consent to the health care.

Safeguard – Requirement to Consult if Major Health Care [s.14 (1)]

Safeguards have been introduced for **major** health care to ensure that the patient's consent rights are protected when a decision is made. The health care provider must consult with the adult's spouse, a relative or a friend, or with any other person who has relevant information, before determining that (a) the adult needs the major health care, (b) and is incapable of giving or refusing consent to it.

Safeguard – Notification Required in Major Health Care Cases [s.14 (4)] and Waiting Period [s.14 (7)]

When the patient's spouse or relative chosen by the health care provider, or the person authorized by the Public Guardian and Trustee, has made the substitute health care decision, the health care provider **must:**

1. Inform (using Form 1.) the adult and any spouse, relative or friend who accompanies the adult of:

   (a) the decision that the adult is incapable;

   (b) the name of the person chosen to make the substitute decisions; and

   (c) the right to ask the Health Care and Care Facility Review Board (the Review Board) within 72 hours to review the decision made by the substitute decision-maker **and**

2. wait for 72 hours before providing treatment in case the adult or some other person applies to the Review Board for a review.

Safeguard – Right to Request a Review if Major Health Care

The health care provider must complete Form 1. and give a copy of it to the adult. It is recommended that a copy of the form also be given to those accompanying the adult.

If a review is requested (e.g., by the incapable adult or by a family member), it must be done by completing Form 2. and forwarding it to the Review Board. The proposed health care must then not be provided until a decision is made by the Review Board, **UNLESS** the adult's condition deteriorates to the point where there is an urgent or emergency health care situation (see page 9).

IV. TEMPORARY SUBSTITUTE DECISION MAKERS [s16]

Choosing a patient's spouse or relative as a substitute decision maker on a temporary basis formalizes what is currently common practice. Usually, a spouse or relative is asked to make a health care decision if the patient is incapable and does not have, for example, a committee of person or a representative.

In accordance with Ministry of Health policy, the TSDM will be "formally" chosen only at the time just before the decision-maker is ready to make the consent decision. This policy exists to resolve a legal technicality resulting from the Act's wording in section 14 (4) which states that the notification requirements come into effect "on choosing" the TSDM.

The health care provider must choose, as substitute decision-maker, the first of the following who is available and qualified[5]:

- the adult's spouse (includes a common law spouse or same sex partner),
- the adult's child (if 19 years of age or older),
- the adult's parent,
- the adult's brother or sister, or
- anyone else related to the adult by birth or adoption.

Section 16 (2) of the Act states: *To qualify to give, refuse or revoke substitute consent to heal care for an adult, a person must (a) be at least 19 years of age, (b) have been in contact with the adult during the preceding 12 months, (c) have no dispute with the adult, (d) be capable of giving , refusing, or revoking substitute consent, and (e) be willing to comply with duties in section 19.*

Note: In the case of a married person who is separated but in a common law relationship, the common law spouse should be chosen[5]. A health care provider must not obtain substitute consent from another health care provider, a practice which occasionally occurs in some hospitals.

The health care provider is not required to do more than make a "reasonable effort in the circumstances" to locate the patient's spouse or near relative. If there is no one available or there is a dispute about who is to be chosen (that cannot be resolved), the health care provider must ask the Public Guardian and Trustee to authorize a person to make the health care decision. When this happens the Public Guardian and Trustee will look into the situation and may either:

- choose a friend or a relative by marriage, a member of the patient's support network, or some other appropriate person to make the decision, or
- as a last resort, authorize a staff member to make the health care decision.

To contact the Health Care Decisions Team with the Public Guardian and Trustee call: In the Lower Mainland - 775 0775; outside the local Vancouver calling area call 1-877-511-4111. The hours of service are Monday to Friday, 8:00 am to 6:00 pm and 8:00 am to 2:00 noon on Saturdays and Sundays, and holidays.

Authority of A Temporary Substitute Decision-Maker [s. 17]

A temporary substitute decision-maker's authority to make health care decisions for the patient lasts for 21 days from the date the decision-maker is chosen. [s. 17(1)]

[5] Note: A health care provider may not "shop" for a consent decision. If the first person on the list who is available and qualified refuses consent on behalf of the patient, the health care provider may not turn to the next person for a decision.

If the health care continues beyond the 21 days, the consent will still be effective, as long as the health care began before the 21 day period ends. For example, a decision-maker may consent to a course of chemotherapy for an adult. The treatment may begin on day 2 after the decision-maker is chosen and continue for 6 weeks. The consent given by the decision- maker to that treatment is in effect for a total of 42 days (i.e. six weeks).

If consent is given, but the health care does not begin within the 21 day period, a new consent must be obtained when the treatment is to begin. This may occur in elective surgery situations where a consent is provided when the patient is placed on a waiting list and then later renewed when the person is called and admitted for surgery.

The Act anticipates that there will be circumstances where a patient's spouse or relative may wish to be relieved of the responsibility of making health care decisions. The health care provider may then choose another person from the list of temporary substitute decision-makers to assume responsibility for the remainder of the 21 day period. [s. 17]

Making Substitute Decisions [s. 19]

Health care decisions can be complex and present ethical dilemmas for families, friends and others who must make decisions for an incapable adult. The Act requires that a decision-maker:

- consult with the patient to the greatest extent possible, and if the decision-maker is a person authorized by the Public Guardian and Trustee, with any friend or relative of the patient who offers to assist, and
- comply with any instructions or wishes the adult expressed (e.g., a living will or other advance directive) while capable, and
- if the adult's instructions or wishes are not known, the decision-maker must decide to give or refuse consent on the basis of the patient's known beliefs and values, or if these are not known, in the patient's best interests.

When making a health care decision based on best interests, the substitute decision-maker must consider:

- the patient's current wishes,
- whether the adult's condition or well-being is likely to be improved by the proposed health care,
- whether the adult's condition or well-being is likely to improve without the proposed health care,
- whether the benefit the adult is expected to obtain from the proposed health care is greater than the risk of harm, and
- whether a less restrictive or less intrusive form of health care would be as beneficial as the proposed health care.

Role of Advance Directives

If a HCP knows that there is an advance directive other than a representation agreement with wishes/instructions that apply to the health care situation at hand of which the substitute decision maker may not be aware, the HCP should draw the content of the advance directive to the attention of the substitute decision maker.

If a HCP is of the opinion that a substitute decision makers' decision is not in keeping with the instructions/wishes contained in the patient's AD, the HCP should not act upon that decision. If the HCP is not able to resolve the matter, he or she should apply to the Review Board for a review of the substitute decision maker's decision.

Restrictions on the Authority of Temporary Substitute Decision-Makers [s. 18]

The Act restricts the decision-making authority of a substitute decision-maker by stating that decisions about some forms of health care are **beyond their authority.** These forms of health care are

- abortion unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;
- electroconvulsive therapy unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;
- psychosurgery;
- removal of tissue from a living human body for implantation in another human body or for medical education or research;
- experimental health care involving a foreseeable risk to the adult for whom the health care is proposed that is not outweighed by the expected therapeutic benefit;
- participation in a health care or medical research program that has not been approved by an ethics committee designated under the Health Care Consent Regulation;
- any treatment, procedure or therapy that involves using aversive stimuli to induce a change in behaviour.

The treating physician must immediately notify the Community Legal Assistance Society (CLAS) after a temporary substitute decision maker has made a consent decision about abortion or electroconvulsive therapy that has been recommended in writing by two physicians. CLAS phone: (604) 685-3425 Fax: (604) 685-7611

A substitute consent may be given for these types of health care by a representative under an "enhanced" representation agreement or a court-appointed committee of person, but only if they are specifically authorized to make such decisions.

Refusing Life Supporting Care and Treatment [s. 18]

A temporary substitute decision-maker may refuse consent to health care necessary to preserve life, but only if there is substantial agreement among the health care providers caring for the adult that the decision to refuse consent is medically appropriate, **and**

- the decision-maker, before making the decision, consults with the adult to the greatest extent possible and makes the decision on the basis of:
  - the adult's wishes expressed while capable (for example, the content of an advance health care directive), or
  - if these are not known, on the basis of the adult's known beliefs and values.

If the decision-maker is a person authorized by the Public Guardian and Trustee, the decision-maker must also consult with any friend or relative of the adult who offers to assist.

If the substitute decision make is Committee of Person or a Representative acting under section 9 of the *Representation Agreement Act*, their decision making is not as limited. They are, in certain circumstances, entitled to refuse life supporting care and treatment even if the health care provider does not believe the refusal is medically appropriate. In such circumstances, obtain legal advice.

V. HEALTH CARE AND CARE FACILITY REVIEW BOARD [s. 24 – 32]

The Act establishes the new Health Care and Care Facility Review Board (the Review Board). The purpose of the Review Board is to provide a mechanism for reviewing a substitute health care decision (made by a temporary substitute decision maker) at the request of either the patient, someone acting on the patient's behalf, or another interested person, such as the patient's health care provider.

The Board consists of members appointed by the Minister of Health. Hearings are conducted by panels consisting of three Board members. Each panel consists of a lawyer (who must be a member of the Law Society of BC), a health care provider and a person who is neither a health care provider nor a member of the Law Society of B.C.

The Board can confirm the substitute decision made, or substitute its own. If it substitutes its own decision, the Board must try to consult with the adult and follow the adult's pre-expressed wishes, or make a decision that reflects the patient's values and beliefs, or is in their best interests.

Appeal from Board decisions

The Review Board's decision may be appealed to the Supreme Court of British Columbia within 30 days after a decision is made by the Board.

If an appeal is made, the Review Board's decision is suspended, but the court may make an interim order authorizing health care to be provided, if it is necessary to prevent physical or mental harm to the patient.

After hearing the appeal, the court may do one or more of the following:

(a) confirm or rescind the decision of the Board

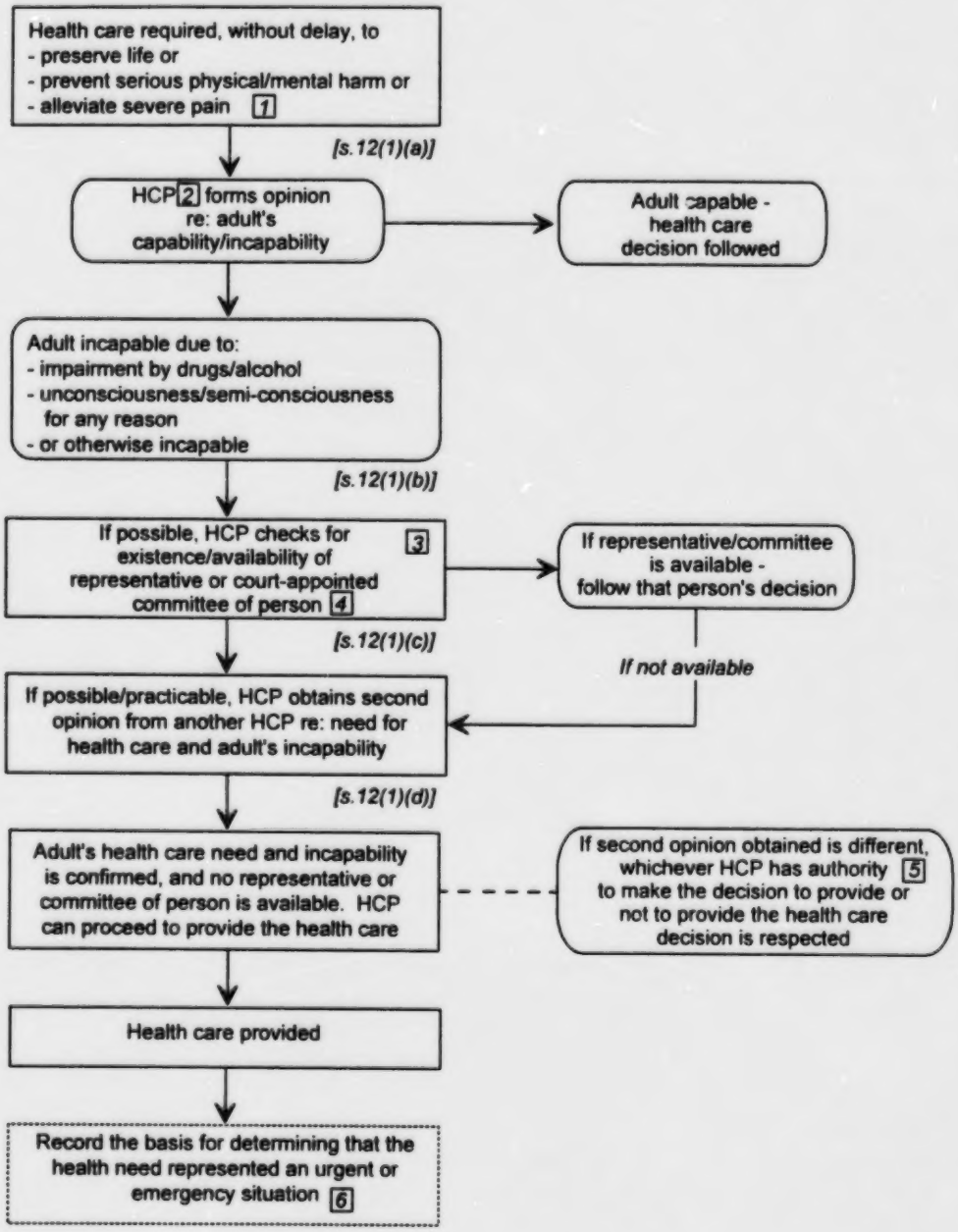
(b) exercise all the powers of the Board and substitute the court's decision for the Board's decision

(c) refer all or part of the matter to the Board for rehearing along with any directions the court considers appropriate [s.31(6)]

VI. APPENDIX I: REGULATED HEALTH PROFESSIONALS WHO MUST COMPLY WITH THE HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION) ACT

STATUTE	PRACTITIONERS	REGULATORY BODY
Chiropractors Act	Chiropractors	British Columbia College of Chiropractors
Dentists Act	Dentists Dental Assistants	College of Dental Surgeons of BC
Health Professions Act	Acupuncturists	College of Acupuncturists of BC
	Dental Technicians	College of Dental Technicians of BC
	Dental Hygienists	College of Dental Hygienists of BC
	Denturists	College of Denturists of BC
	Licensed Practical Nurses	College of Licensed Practical Nurses of BC
	Massage Therapists	College of Massage Therapists of BC
	Midwives	College of Midwives of BC
	Occupational Therapists	College of Occupational Therapists of BC
	Opticians	College of Opticians of BC
	Physical Therapists	College of Physical Therapists of BC
	Registered Psychiatric Nurses	College of Registered Psychiatric Nurses of BC
Hearing Aid Act	Audiologists (private practice) Hearing Aid Dealers	Board of Hearing Aid Dealers and Consultants
Medical Practitioners Act	Physicians Osteopaths	College of Physicians and Surgeons of BC
Naturopaths Act	Naturopaths	Association of Naturopathic Physicians of BC
Nurses (Registered) Act	Registered Nurses	Registered Nurses Association of BC
Optometrists Act	Optometrists	Board of Examiners in Optometry
Podiatrists Act	Podiatrists	Board of Examiners in Podiatry
Psychologists Act	Psychologists	College of Psychologists in BC
Social Workers Act	Social Workers	Board of Registration

APPENDIX II: CONSENT IN **URGENT OR EMERGENCY HEALTH CARE** SITUATIONS


Health care required, without delay, to
- preserve life or
- prevent serious physical/mental harm or
- alleviate severe pain [1]
[s.12(1)(a)]
HCP [2] forms opinion re: adult's capability/incapability
Adult capable - health care decision followed
Adult incapable due to:
- impairment by drugs/alcohol
- unconsciousness/semi-consciousness for any reason
- or otherwise incapable
[s.12(1)(b)]
If possible, HCP checks for existence/availability of representative or court-appointed committee of person [4] [3]
If representative/committee is available - follow that person's decision
[s.12(1)(c)]
If not available
If possible/practicable, HCP obtains second opinion from another HCP re: need for health care and adult's incapability
[s.12(1)(d)]
Adult's health care need and incapability is confirmed, and no representative or committee of person is available. HCP can proceed to provide the health care
If second opinion obtained is different, whichever HCP has authority [5] to make the decision to provide or not to provide the health care decision is respected
Health care provided
Record the basis for determining that the health need represented an urgent or emergency situation [6]

[1] = *Pain that is so severe that the adult is unable to give a valid consent*

[2] = *Health Care Provider*

[3] = *If it is possible within a time that is reasonable to:*
1. *determine if the adult has a committee of person/representative, and*
2. *communicate with that person [s.12(2)]*

[4] = *a person appointed by the court under the Patients Property Act*

[5] = *In practice, this will usually be "the most responsible physician"*

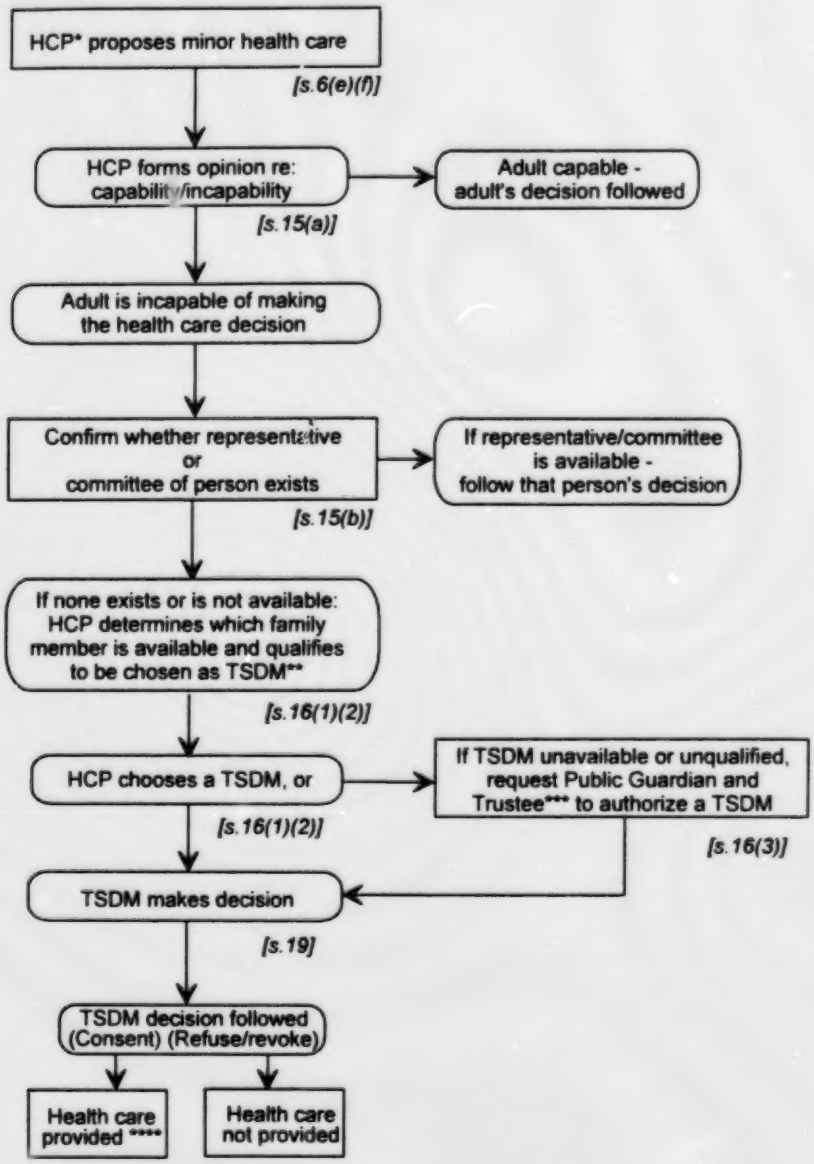
[6] = *Not required under the Act, but recommended as good practice, and for quality assurance, and potential legal purposes*

[ ] Refer to Act

Action

Decision

APPENDIX II: CONSENT IN **MINOR HEALTH CARE** FOR INCAPABLE ADULTS


HCP* proposes minor health care
[s.6(e)(f)]
HCP forms opinion re: capability/incapability
Adult capable - adult's decision followed
[s.15(a)]
Adult is incapable of making the health care decision
Confirm whether representative or committee of person exists
If representative/committee is available - follow that person's decision
[s.15(b)]
If none exists or is not available: HCP determines which family member is available and qualifies to be chosen as TSDM**
[s.16(1)(2)]
HCP chooses a TSDM, or
If TSDM unavailable or unqualified, request Public Guardian and Trustee*** to authorize a TSDM
[s.16(1)(2)]
[s.16(3)]
TSDM makes decision
[s.19]
TSDM decision followed (Consent) (Refuse/revoke)
Health care provided ****
Health care not provided

HCP* = *Health Care Provider*

TSDM** = *Temporary Substitute Decision Maker chosen by the HCP (spouse, child, parent, brother or sister, or anyone else related by birth or adoption to the adult) or person authorized by the Public Guardian and Trustee [s. 16]*

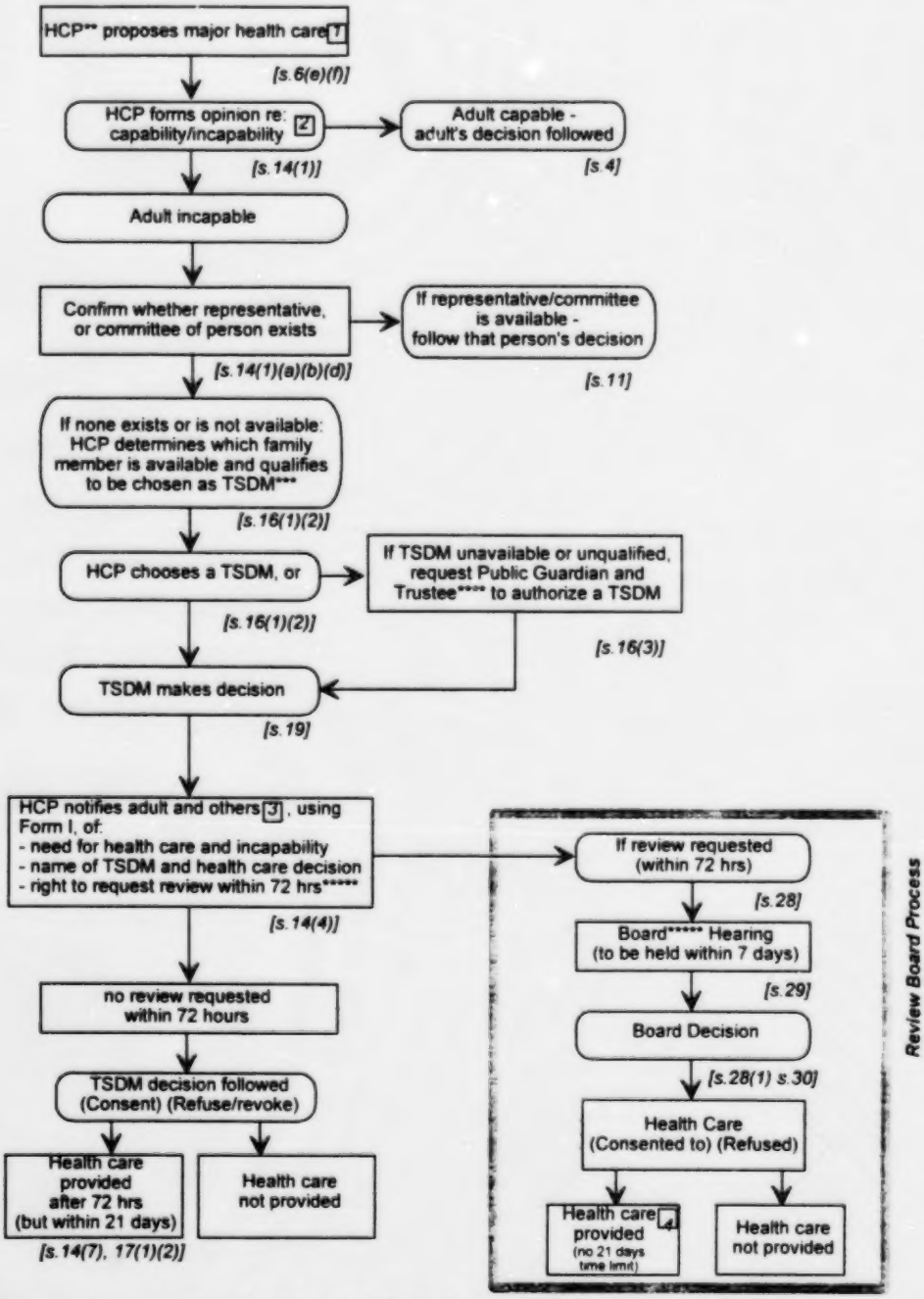
*** = *To contact the Health Care Decisions Team with the Public Guardian and Trustee call: In the Lower Mainland: 775-0775; outside the local Vancouver calling area call: 1-877-511-4111. The hours of service are Monday to Friday, 8:00 a.m. - 6:00 p.m. and 8:00 a.m. to 12:00 noon on Saturdays, Sundays and holidays.*

**** = *The health care can be provided immediately. (There is no 72 hour waiting period when a TSDM gives consent for minor health care).*

[ ] Refer to Act ▭ Action ⬭ Decision

APPENDIX II: CONSENT IN **MAJOR HEALTH CARE*** FOR INCAPABLE ADULTS

[ss.14 and 16]


HCP** proposes major health care [1]
[s.6(e)(f)]
HCP forms opinion re: capability/incapability [2]
[s.14(1)]
Adult capable - adult's decision followed
[s.4]
Adult incapable
Confirm whether representative, or committee of person exists
[s.14(1)(a)(b)(d)]
If representative/committee is available - follow that person's decision
[s.11]
If none exists or is not available: HCP determines which family member is available and qualifies to be chosen as TSDM***
[s.16(1)(2)]
HCP chooses a TSDM, or
[s.16(1)(2)]
If TSDM unavailable or unqualified, request Public Guardian and Trustee**** to authorize a TSDM
[s.16(3)]
TSDM makes decision
[s.19]
HCP notifies adult and others [3], using Form I, of:
- need for health care and incapability
- name of TSDM and health care decision
- right to request review within 72 hrs*****
[s.14(4)]
no review requested within 72 hours
TSDM decision followed (Consent) (Refuse/revoke)
Health care provided after 72 hrs (but within 21 days)
[s.14(7), 17(1)(2)]
Health care not provided
If review requested (within 72 hrs)
[s.28]
Board***** Hearing (to be held within 7 days)
[s.29]
Board Decision
[s.28(1) s.30]
Health Care (Consented to) (Refused)
Health care provided [4] (no 21 days time limit)
Health care not provided
Review Board Process

[1] = *The health care provider has a duty to consult with the adult's spouse, relative or friend or with any other person who has relevant information before deciding that the adult needs major health care and is incapable*

[2] = *If adult is apparently incapable, conduct assessment of incapability using MOH incapability assessment guidelines*

[3] = *Others are: "... any spouse, relative or friend who accompanies the adult."*

[4] = *The health care may be provided unless there is an appeal to the court [s.32]*

Major Health Care* = *defined in the Act and Health Care Consent Regulation*

HCP** = *Health Care Provider (anyone who, under a prescribed Act, is licensed, certified, or registered to provide health care)*

TSDM*** = *Temporary Substitute Decision Maker chosen by the HCP (spouse, child, parent, brother or sister, or anyone else related by birth or adoption to the adult) or person authorized by the Public Guardian and Trustee*

**** = *To contact the Health Care Decisions Team with the Public Guardian and Trustee call: In the Lower Mainland: 775-0775; outside the local Vancouver calling area call: 1-877-511-4111. The hours of service are Monday to Friday, 8:00 a.m. - 6:00 p.m. and 8:00 a.m. to 12:00 noon on Saturdays, Sundays and holidays*

***** = *Health Care and Care Facility Review Board, fax: (604) 524-7216*

[ ] Refer to Act ▭ Action ⬭ Decision

VIII: Appendix III:
THE ROLE OF ADVANCE DIRECTIVES IN THE HEALTH CARE CONSENT PROCESS

Urgent and Emergency Situations

The decision-making process with respect to consent to health care is governed by section 12 of Act.

The general rule is that if the adult is incapable of making a consent decision, health care may be provided without the adult's consent - subject to the rules of s.12 being followed. This means that the health care provider (HCP) must make reasonable effort to determine existence of a committee of person or a representative and contact that person to make the consent decision.

The effort to identify the existence of a representative or committee of person may result in someone being contacted who may know something about the patient's prior capable wishes, or the patient's values or beliefs as they might apply to the presenting health problem and proposed treatment.

If the patient has an advance directive containing instructions/wishes that clearly apply to the presenting health need and the range of treatment choices, these instructions/wishes should be followed. If there is doubt about them being the latest instructions expressed while capable, or where the treatment of choice might not have been known when the advance directive was made, then the directive should not be followed.

Family or friends may be able to corroborate the authenticity and currentness of the advance directive and its content.

In many urgent and emergency situations it will not be feasible to determine if the patients has an advance directive, and if so, what the content of the advance directive is. In that case, the health care provider makes the decision in the "best interests" of the patient, and in accordance with medical ethics.

Non-Urgent or Non-Emergency Situations

The decision-making process is governed by section 5(1) of the Act. This section states that "A health care provider must not provide any health care to an adult without the adult's consent except under sections 11 to 15".

This means that if the adult is incapable of making the health care consent decision at hand, the health care provider (HCP) must make a reasonable effort to determine if there is a prior authorized substitute decision maker (committee of person or representative).

Where there is no prior authorized substitute decision maker to make the consent decision, the HCP must try to obtain consent from the adult's spouse or other family member – unless it is an urgent or emergency health care situation. **Consent from the spouse or other family member must be obtained even if there is an advance directive which clearly states/conveys what health care the adult would have wanted (or not wanted) in the current circumstances.**

If there is no available and qualified family member willing to make the consent decision, the HCP **must** contact the Public Guardian and Trustee (PGT) and ask the PGT to authorize another person to make the consent decision. The PGT must be contacted even if the proposed treatment is minor health care (see page 8 for contact information).

Note: If the family member or the person authorized by the PGT consents to the proposed health care and it is major health care, the health care must be provided (or started) within 21 days; if not, a new consent decision must be obtained. This is why the Act uses the term "temporary substitute decision maker" (TSDM) to describe this category of substitute decision makers. When a TSDM makes a consent decision for major health care, there are specified notification requirements. Also, there is a 72 hour waiting period during which a review of the consent decision by the Health Care and Care Facility Review Board may be requested.

If a HCP knows that there is an advance directive with wishes/instructions that apply to the health care situation at hand of which the substitute decision maker may not be aware, the HCP should draw the content of the advance directive to the attention of the substitute decision maker.

As of February 29, 2000, if it is not an urgent or emergency health care situation, the **instructions or wishes contained in an advance directive can not be acted upon directly by a HCP.**

The advance directive is still valuable however in that the wishes or instructions provide direction to the substitute decision maker. These directions must be followed and reflected in the substitute decision makers' consent decision, unless there are compelling reasons to do otherwise.

If a HCP is of the opinion that a substitute decision maker's decision is not in keeping with the instructions/wishes contained in the patient's advance directive, the HCP should not act upon that decision. If the HCP is not able to resolve the matter, he or she should apply to the Review Board for a review of the substitute decision maker's decision.

BRITISH COLUMBIA
Ministry of Health and
Ministry Responsible for Seniors

FORM 1
HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION)ACT
Section 14 (4) (b) of the Act

NOTICE OF INCAPABILITY AND SUBSTITUTE CONSENT (MAJOR HEALTH CARE)

To: _____
name of adult for whom substitute consent has been given (please print)

I, _____,
name of health care provider (please print)

am your physician/other health care provider and I have proposed the following health care for you:

_____

_____

_____

_____

I have determined, using the legal test of incapability stated in section 7 of the *Health Care (Consent) and Care Facility (Admission) Act*, that you are incapable of giving or refusing consent to the health care described above.

To the best of my knowledge, you do not have a committee, or representative, who is authorized to make a decision for you about the health care described above.

Therefore, I have chosen _____
name and phone number of Temporary Substitute Decision Maker (please print)

and he/she has ☐ given ☐ refused *(check ONE box only)* substitute consent to the health care described above.

You, your spouse or a relative or friend of yours has the right to request a review of the decision to give or refuse substitute consent for the health care described above. A request for a review must be delivered to the Health Care and Care Facility Review Board within 72 hours after the decision to give or refuse substitute consent for the health care described above was made. The request must be delivered to:

Registrar, Health Care and Care Facility Review Board
Unit 6, 500 Lougheed Highway
Port Coquitlam, British Columbia, V3C 4J2
Tel: 604-524-7219 or 604-524-7220 Fax: 604-524-7216

The decision to ☐ give ☐ refuse *(check ONE box only)* substitute consent to the health care described above

was made on: _____ at _____ am / pm.
date (dd / mm / yyyy) *time*

_____ _____
signature of care provider *position / title*

_____ _____ am / pm.
date (dd / mm / yyyy) *time*

BRITISH COLUMBIA
Ministry of Health and
Ministry Responsible for Seniors

FORM 2
HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION)ACT
Section 28 of the Act

REQUEST FOR REVIEW

Personal information on this form is collected under the authority of the *Health Care (Consent) and Care Facility (Admission) Act [Section 28]*. The information will be used to request a review of the temporary substitute decision maker's consent decision to the Health Care and Care Facility Review Board. If you have any questions about the collection of this information contact the Registrar, Health Care and Care Facility Review Board,Unit 6, 500 Lougheed Highway,Port Coquitlam, British Columbia, V3C 4J2. Phone: 604-524-7219 or 604-524-7220. Personal information will be used and disclosed in accordance with the provisions of the *Freedom of Information and Protection of Privacy Act* .

I am requesting a review of the decision made on _____ at _____ am/pm
date (dd / mm / yyyy) *time*

by _____ to ☐ give *(check ONE box only)*
name of substitute decision maker ☐ refuse
☐ revoke

substitute consent to the following health care:

_____

_____

_____

This health care is ☐ being provided by _____
☐ proposed by *name of health care provider*
(check ONE box only)

for _____
name of adult to whom health care is being provided / is proposed

In summary, the reasons for requesting a review are as follows:

_____

_____

_____

_____

APPLICANT INFORMATION

_____
name

_____
relationship to adult who is subject of this request

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

ADULT INFORMATION

_____
name

_____
facility in which adult is currently located, if applicable

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

HEALTH CARE PROVIDER INFORMATION

_____
name

_____
title/position/occupation

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

SUBSTITUTE DECISION MAKER INFORMATION

_____
name

_____
title/position/occupation

_____
relationship to adult who is subject of this request

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

This request must be delivered to the Board within 72 hours after the decision to be reviewed is made, or the Board may not be able to consider your request. The request must be delivered to:

Registrar, Health Care and Care Facility Review Board
Unit 6, 500 Lougheed Highway
Port Coquitlam, British Columbia, V3C 4J2

Tel: 604-524-7219 or 604-524-7220 Fax: 604-524-7216

The Board must hold a hearing within 7 days of receiving a request for review. Please answer the following questions:

Where would you like the hearing to be held? _____

Do you need a translator? ❒ yes ❒ no *(circle one)*

Are you being represented by legal counsel? If yes, please complete the following;

_____
name of legal counsel

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

The Board must inquire fully into the circumstances of your case. Please send the Registrar copies of all documents you intend to rely on at least 24 hours before the hearing.

_____ _____ _____ am/pm.
signature of applicant *date (dd / mm / yyyy)* *time*